THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1981-82

6 Div. 638

Donald Cook

v.

State

Appeal from Walker Circuit Court

BARRON, JUDGE

Donald Cook was convicted by a Walker County Circuit Court jury of assault in the third degree. The trial court entered a judgment of conviction and sentenced Cook to 12 months' hard labor. Hence this appeal.

During the pre-dawn hours of October 4, 1980, two officers of the Carbon Hill Police Department, John Mark Tirey and Larry Cagle, followed appellant's car to his residence. Immediately prior thereto the officers had stopped appellant, and he had abruptly left the scene in his vehicle upon being requested by one of the officers "to step out of the car." The evidence is conflicting as to whether the blue light on the officers' patrol car was operating during the pursuit of appellant to his residence.

The officers testified that they arrived at appellant's residence in time to see four people leave appellant's car and go into the house, and saw appellant return to the front porch with "a long gun" in his hand. They further testified that they heard two shotgun blasts fired from the front porch. Officer Cagle was hit by one of the shots, and Officer Tirey fired two shots at appellant, who was on the front porch.

Police reinforcements arrived and, by the use of a loudspeaker system, the occupants of the residence were told to come out of the house. Three people, not including appellant, came out of the

house, and a search of the house and the adjoining area failed to locate appellant.

Later that same morning, "somewhere after 9:00," an arrest warrant was issued for appellant. Appellant was located at someone else's residence "in the back bedroom closet" sitting on the floor, and was arrested.

I

Appellant contends that the State failed to prove venue and that, therefore, the trial court erred to reversal in denying appellant's motion for

a directed verdict at the conclusion of the State's case. We disagree, finding that venue was sufficiently established by the testimony of Officer Tirey in describing appellant's residence and the incident which occurred there:

"Q. Is this particular area located in Walker County?

"A. Yes sir, it is."

II

Next, appellant contends that the trial court erred in denying his motion for a mistrial on the grounds that improper impeachment of a defense witness was permitted, over objection, relative to a prior conviction involving moral turpitude.

Generally, on cross-examining a witness about a prior conviction, only inquiries about the designation of the crime, the time and place of conviction, and the punishment are proper. Favor v. State, 389 So. 2d 556 (Ala. Crim. App. 1980), and the authorities therein cited.

A review of the record reveals that two questions on cross-examination of that nature were propounded to witness Steve Cook, and neither question exceeded the permissible limits.

Appellant further complains that the State improperly used the word "convictions," erroneously indicating more than one conviction, as follows:

> "MR. GUSTIN [Prosecutor]: Judge, I have a right to go into this man's prior felony convictions to show the jury how much credit they can put in his testimony."

The remark occurred in a colloquy among the trial court, appellant's attorney, and the prosecutor after appellant's objection to one of the

prosecutor's questions, which we have determined was within the permissible limits.

Immediately after the prosecutor's remark, appellant pointed out the fact of only one conviction. In addition, during the colloquy, the trial court gave the following instruction to the jury:

> "COURT: Ladies and gentlemen of the jury, the fact that a witness may have been convicted of a crime involving moral turpitude or a felony would not help us in arriving at a verdict in this case.

> "The only conceivable purpose in allowing these facts, if they be facts, would be as to their bearing on the witness's credibility as a witness and none of the details of such a transaction are admissible for your consideration whatsoever. If it be a fact, then the fact iself is the only thing that would be appropriate for us to consider under any circumstances and that's solely for the purpose of whatever bearing you might think that it would have on his credibility and you will not consider anything else for any other reason.
>
> "All right, gentlemen."

It is clear that the jury understood that only one prior conviction was involved.

After inquiring of the witness about a specific prior offense, the prosecutor asked whether the witness liked "these police involved." The witness replied: "No sir, not really. I don't like coming to court."

It is obvious from the question and from the answer of the witness that the reference was to the police involved in the case at bar, and not the prior conviction case.

We hold that the trial court's denial of the motion for a mistrial was proper.

III

Appellant urges that the trial court erred in the oral jury charge when it charged that a defense witness had been impeached. The applicable portion of the charge is:

> "If you find from the evidence in this case that any witness has been impeached or successfully impeached, that doesn't mean that you must necessarily disregard that witness's testimony in whole or in part for there may be other evidence in the case that tends to support or corroborate that testimony or some part of the testimony, but as I have told you, you will be the sole and exclusive judges of what you believe and what you don't believe. And I charge you in this connection that one of the witnesses was impeached by proving that he had been convicted of a crime involving moral turpitude."

No objections were made by appellant to the trial court's oral charge. The record reveals the following statement by appellant's attorney immediately following the oral charge:

"No exceptions, Your Honor."

Therefore, nothing is preserved for review on this issue. Where no exceptions or objections are made to the trial court's oral charge, this court cannot review the issue of an asserted error in the jury instructions. Storie v. State, 390 So. 2d 1179, writ denied, 390 So. 2d 1184 (Ala. Crim. App. 1980); Hewitt v. State, 389 So. 2d 157 (Ala. Crim. App. 1980); Langley v. State, 383 So. 2d 868, writ denied, 383 So. 2d 873 (Ala. Crim. App. 1980).

In view of the above, the judgment of the trial court is due to be affirmed.

AFFIRMED.

All the Judges concur.

Denial of Application for Rehearing.

THE ALABAMA COURT OF CRIMINAL APPEALS
Montgomery, Alabama

RE: CC 80-392

6th Div. 638, WALKER Circuit Court

DONALD COOK
vs Appellant

THE STATE Appellee

Dear Sir: This is to advise you that on JUL 27 1982, the Court of Criminal Appeals announced decision of:

~~affirmance~~
~~appeal dismissed~~
application for rehearing overruled
~~petition denied dismissed stricken~~

No opinion.

in the above stated cause.

Yours truly,
MOLLIE JORDAN, CLERK

MAILING ADDRESS:
P.O. BOX 157
MONTGOMERY, ALABAMA 36101

TELEPHONE: 832-6480

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

October 22, 1982

Re: 81-960
Ex Parte: Donald Cook
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Donald Cook vs. State of Alabama)

Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

Denial of Cert. by Alabama Supreme Ct. A10

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

xxxxxxx Petition for Writ of Certiorari denied. No opinion. SHORES, J. -- TORBERT, C.J., MADDOX, JONES AND BEATTY, JJ., CONCUR.

_____ Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

_____

10-22-82
wo

Dorothy F. Norwood

Acting Clerk, Supreme Court of Alabama

Denial of Cert. by Ala. Sup. Court. All

III.

The Court on the question of improper jury instruction refused to review the Trial Court's assertion that a defense witness had been impeached. The reason thus stated by the Court was that no exception had been taken and therefore there was no error preserved in the record which was subject to review.

The appellant at this time would cite to the Court the following section taken from the 1975 Code of Alabama, Title 12-22-240:

> "In all cases appealable to the court of criminal appeals, the court must consider all questions apparent on the record or reserved in the circuit court and must enter such judgement as the law demands."

The purpose of this section requiring the appellate

courts to consider all questions apparent on the record, are so that all proceedings as shown by the record are regular, and to affirmatively ascertain that due process of the law prevails in every case, Smith v. State, 21 Ala. App. 70, 105 So. 397; James v. State, 28 Ala. App. 225, 181 So. 709.

It is obvious from the forgoing citations that the Court is under the obligation to rule on all meritorious questions which are propounded to it. It is the contention of the appellant that the improper instruction was " apparent on the record" and should be reviewed. The wording in the statute (must) makes this mandatory. The further wording, "apparent on the record or reserved in the circuit

court" tends to define those errors which are reviewable as all errors which are apparent on the record. The conjunction "or" rather that "and" does not exclude those errors which have not been excepted to. This is mandatory for due process. This section imposes a duty on the Court to search the record for errors in all criminal cases and to consider all questions apparent on the record or reserved, Wallace v. State, 290 Ala. 201, 275 So. 2d 634. A refusal to address a proper issue properly raised by an appellant would be a denial of his rights to "due process" under the Constitution of the United States and the State of Alabama.

In further support of the appellant's contention, the appellant refers the Court to its decision in Harris v. State, 371 So. 2d 979 (Ala. Cr. App.). The Court addressing the same issue under the same statute stated:

> " Although only the issue of the refused charges was expressly presented on this appeal, it is our statutory duty to search the record for any error which was duly preserved at trial. Section 12-22-240, Code of Alabama 1975. Therefore, four other points raised only at trial have been considered."

It is the contention of the appellant that the same obligation is owed to him under the same statute in this case.

The trial attorney for the appellant had properly raised the question of the impeachment of the witness during the course of the trial and was further owed the obligation by the Trial Court to refrain from commenting on the credibility of his witness in order to furnish him an impartial jury and thus "due process".

The appellant contends as in Davis v. State, 20 Ala. App. 463, 103 So. 73, including other citations included in his

original brief, where the trial court has commented on his evidence to the jury, has been prejudiced.

The appellant distinguishes those cases of Storie, Hewitt, and Langely as cited in support of the Court's decision of June 29, 1982. These cases generally involve those charges which have been refused or those which have not been addressed or preserved on the record during the course of the trial. The appellant's trial attorney had raised the issue (witness impeachment) during the course of the trial and made motions on the record of the fact. The Trial Court was obligated not to charge the jury that his witness had been impeached. This was "apparent on the record".

CONCLUSION

The appellant is of the opinion that his constitutional rights and due process requirements have been violated due to the manifest errors which are set out above. He is of the opinion that he is entitled to a rehearing of the said cause in the interests of justice and fair play.

William H. Manasco

William H. Manasco
Attorney for the Appellant

ISSUES OF LAW

I.

Whether the trial court erred in failing to grant the defense attorney's motion for failure to prove venue at the end of the State's case in chief.

Stokes v. State, 373 So. 2d 1211, (Ala. Cr. App.)
Walker V. State, 153 Ala. 31, 45 So. 640

II.

The trial court improperly admitted evidence in improper form on the prior conviction of a defense witness for the purposes of impeachmnet.

Favor v. State, 389 So. 2d 556, (Ala. Cr. App. 1980)

Texts.

Gamble's - McElroy's Alabama Evidence - Section 145.01(11)

III.

The trial court court erred in charging the jury that a defense witness had been impeached by evidence of a prior conviction.

Andrews v. State, 159 Ala. 14, 48 So. 858.
Harris v. State, 371 So. 2d 979, (Ala. Cr. App.).
Pease v. Montgomery, 331 So. 2d 221.

Texts.

Code of Alabama - 1975 - Section 12-22-240
Gamble's-McElroy's Alabama Evidence - Section 469.01

IV.

The Court of Criminal Appeals is denying the appellant his rights to due process under the Constitutions of the United States and the State of Alabama by refusing to address his improper jury charge upon appeal.

This issue raised upon appeal.

ISSUE III.

The appellate court contends that because no exception was taken to the trial court's erroneous charge to the jury that a defense witness had been impeached, nothing was preserved on the record for review.

The appellant contends that the trial court's oral charge to the jury that his witness had been impeached was erroneous. (see appellate decision for charge). The appellant cites the following from Gamble's-McElroy's Alabama Evidence-Section 469.01 with regard to the impropriety of the charge:

> "It is improper for a trial judge to comment to the jury upon the weight of the evidence or the credibility of a witness. In charging the jury, it is the duty of the trial judge not to indicate, by the matter or manner of his charge, what his own views are as to the effect of the testimony. ...

This is also upheld in Pease v. Montgomery, 333 So. 2d 221, and Andrews v. State, 159 Ala. 14, 48 So. 858.

The appellate court's refusal to address this issue supported by its citation of Storie, Hewitt, and Langely (See appellate decision for cites) are a denial af the appellant's right to "due process" of the law. These cases involved refused requested charges on behalf of the defendants. The instant case involved a spontaneous declaration on the part of the trial court without prior initiation. The appellant further contends that the Court of Criminal Appeals is under an obligation under Title 12-22-240 of the 1975 Code of Alabama to address this issue. It states as follows:

> "In all cases appealable to the court of criminal appeals, the court must consider all questions apparent on the record or reserved in the court and must enter such judgement as the law demands."

The appellate court has further upheld this position in Harris v. State, 371 So. 2d 979 (Ala. Cr. App.). In this case the court admitted that it had a statutory duty to examine the entire record and enter such judgement as the law demanded. It further addressed four points in the Harris case that were raised only at trial. The wording of the statute by ,"apparent on the record or reserved", is inclusive of this type of error. The appellant contends that the improper jury charge is reversible error and that the appellate court is denying his due process by failure to address it.

ISSUE IV.

The appellant had initially addressed three issues in his original appeal. The Court of Criminal Appeals has through its decision of June 29, 1982, raised the following issue. The appellant contends that the Alabama Court of Criminal Appeals is denying his rights to "due process of law" under the Constitution of the United States and the State of Alabama by refusing to review the improper jury charge as required under statute.

Division 7.

Disposition of Appeals.

§ 12-22-240. Consideration of cases by court of criminal appeals generally.

In all cases appealable to the court of criminal appeals, the court must consider all questions apparent on the record or reserved in the circuit court and must enter such judgment as the law demands. (Code 1876, § 4990; Code 1886, § 4509; Code 1896, § 4333; Code 1907, § 6264; Code 1923, § 3258; Code 1940, T. 15, § 389.)

Cross reference. — As to rules of supreme court relative to error without injury, see A.R.A.P., Rule 45.

Editor's note. — The following cases were decided prior to the promulgation of the Alabama Rules of Appellate Procedure and the revision of this section pursuant to recodification in the 1975 Code.

Purpose of section. — The purpose of this section requiring appellate courts (now court of criminal appeals) to consider all questions apparent on the record and see that proceedings as shown by record are regular, is to affirmatively ascertain that due process of law prevails in every criminal case. Smith v. State, 21 Ala. App. 70, 105 So. 397 (1925); James v. State, 28 Ala. App. 225, 181 So. 709 (1938).

This provision was inserted to abolish the need for assigning error to obtain review in the appellate court; it does away with the need for a brief, though not for a lawyer for an indigent. Echols v. State, 47 Ala. App. 23, 249 So. 2d 639 (1971).

This section is not applicable to reviews by the supreme court on applications for certiorari to the court of criminal appeals (formerly court of appeals). It only applies where the appeal is direct to the reviewing court. Walden v. State, 240 Ala. 193, 198 So. 264 (1940); Gandy v. State, 240 Ala. 202, 198 So. 267 (1940). See A.R.A.P., Rule 39.

Section has no application to motions for rehearings. — This section has application to the consideration of criminal cases on original submissions, and not to motions for rehearings in such cases. De Graaf v. State, 34 Ala. App. 137, 37 So. 2d 130 (1948). See A.R.A.P., Rule 40.

Applicability of section to appeals from prosecutions under municipal ordinances. — Formerly prosecutions under city ordinances were quasi criminal, and on appeal to court of last resort were subject to rules governing civil appeals, hence this section did not apply. Casteel v. City of Decatur, 215 Ala. 4, 109 So. 571 (1926). See also Craig v. City of Birmingham, 14 Ala. App. 329, 71 So. 983 (1916); Macon v. City of Anniston, 18 Ala. App. 552, 92 So. 913 (1922); Childs v. City of Birmingham, 19 Ala. App. 71, 94 So. 790 (1922); Washington v. City of Tuscaloosa, 19 Ala. App. 228, 96 So. 464 (1923); Russell v. City of Bessemer, 19 Ala. App. 554, 99 So. 53 (1924); Tharpe v. City of Birmingham, 23 Ala. App. 23, 119 So. 594, cert. denied, 219 Ala. 704, 121 So. 918 (1929); Gentle v. City of Huntsville, 26 Ala. App. 374, 160 So. 273 (1935); Swinea v. City of Florence, 28 Ala. App. 332, 183 So. 686 (1938); Arnold v. City of Mobile, 33 Ala. App. 95, 30 So. 2d 40 (1947); Griffith v. City of Birmingham, 34 Ala. App. 225, 39 So. 2d 693 (1948), cert. denied, 252 Ala. 129, 39 So. 2d 693 (1949); Lee v. City of Marion, 40 Ala. App. 126, 108 So. 2d 385 (1959); Woods v. City of Tuscaloosa, 43 Ala. App. 626, 198 So. 2d 306 (1967); Ray v. City of Prichard, 45 Ala. App. 32, 222 So. 2d 345 (1969); Wallis v. City of Jasper, 49 Ala. App. 732, 275 So. 2d 712 (1973). See now A.R.A.P., Rule 1.

And appeals from orders revoking probation. — Formerly, appeal from an order revoking probation was not within the purview of this section. Sparks v. State, 40 Ala. App. 551, 119 So. 2d 596 (1959). See also Hemphill v. State, 41 Ala. App. 441, 134 So. 2d 432 (1961). See now A.R.A.P., Rule 1.

This section is the paramount law for review of appeals. Blakely v. State, 43 Ala. App. 654, 198 So. 2d 803 (1967).

Sufficiency of section as to protection of constitutional rights. — This section in and of itself strongly tends to protect all the constitutional rights of an appellant. The supreme court and the court of appeals (now court of criminal appeals) have through the years conscientiously met the duty cast upon them by the requirements of this section, whether or not counsel appeared for the appellant and whether or not briefs were filed in his behalf. Caton v. State, 281 Ala. 486, 205 So. 2d 239 (1967).

Under recent federal decisions it is doubtful that the provisions of this section are now sufficient to protect the constitutional rights of an appellant in all cases, and counsel must be furnished an indigent appellant where the record is unclear or the errors are hidden. Caton v. State, 281 Ala. 486, 205 So. 2d 239 (1967).

With respect to indigent appellants, the review accorded by this section without counsel on appeal has been held bad. Echols v. State, 47 Ala. App. 23, 249 So. 2d 639 (1971).

Section makes right of appeal one of substance. — It has been said that this section, construed in pari materia with others, makes the right of appeal in criminal cases one of substance imposing on the court a duty to search the record for errors. Roberson v. State, 175 Ala. 15, 57 So. 829 (1912); Howerton v. State, 191 Ala. 13, 67 So. 979 (1915); Bigham v. State, 203 Ala. 162, 82 So. 192 (1919); Stone v. State, 208 Ala. 50, 93 So. 706 (1922); Wesson v. State, 238 Ala. 399, 191 So. 249 (1939); De Graaf v. State, 34 Ala. App. 137, 37 So 2d 130 (1948), Johnson v. State, 257 Ala. 644, 60 So. 2d 818 (1952); Payne v. State, 261 Ala. 397, 74 So. 2d 630 (1954); Walker v. State, 265 Ala. 233, 90 So. 2d 221 (1956); Chappelle v. State, 267 Ala. 37, 99 So. 2d 431 (1957).

While the right to appeal is purely a creature of our statutes, the legislature, by adopting the provisions of this section, clearly indicates the legislative purpose that such right shall not, in any criminal case, become a mockery, but that the right shall be substantial, and that this court shall see to it that a defendant who has been convicted in a criminal case, and who has reserved a question of law for the consideration of the court of criminal appeals (formerly court of appeals), and who prays an appeal, shall be accorded the privilege of having the legal questions presented by his record properly passed upon. Hammonds v. State, 44 Ala. App. 256, 206 So. 2d 924 (1968).

This section affords the minimum scope of appellate review in criminal appeals. Echols v. State, 47 Ala. App. 23, 249 So. 2d 639 (1971).

The scope of examination on certiorari or writ of error is much narrower than is accorded on appeal. Ex parte Jordan, 41 Ala. App. 590, 143 So. 2d 670 (1962).

Standards of section and section 12-22-241 compared. — The court in searching the record under this section is confined to points on which rulings adverse to the defendant are had in the trial court. The plain error doctrine applies to death penalty cases but not to other convictions. Stinson v. State, 56 Ala. App. 312, 321 So. 2d 277 (1975).

No invidious discrimination between standards of section and section 12-22-241. — There is no invidious discrimination between the standards of appellate review exhibited by § 12-22-241 and this section. Echols v. State, 47 Ala. App. 23, 249 So. 2d 639 (1971).

There is no line drawn between rich and poor under the dichotomy between § 12-22-241 and this section. Echols v. State, 47 Ala. App. 23, 249 So. 2d 639 (1971).

Under this section, the court treats appeals untinctured by presumptions. Gore v. State, 45 Ala. App. 146, 227 So. 2d 432 (1969).

Court must consider all questions apparent on record or reserved. — On the appeal of a criminal case, the reviewing court under this section has the duty to consider all questions apparent on the record or reserved. Sanford v. State, 26 Ala. App. 311, 159 So. 271 (1935); Green v. State, 27 Ala. App. 209, 170 So. 72 (1936); Woodham v. State, 28 Ala. App. 62, 178 So. 464 (1938); James v. State, 28 Ala. App. 225, 181 So. 709 (1938); Sasser v. State, 29 Ala. App. 326, 195 So. 564 (1940).

Under this section the appellate court must on its own motion take cognizance of patent discrepancies and errors. Hawkins v. State, 20 Ala. App. 285, 101 So. 514 (1924).

It has been said that this section imposes on the court the duty to search the record for errors. Hughes v. State, 213 Ala. 555, 105 So. 664 (1925); Wesson v. State, 238 Ala. 399, 191 So. 249 (1939); Hovey v. State, 29 Ala. App. 149, 195 So. 282 (1940).

It is the duty of the appellate court to examine the record and ascertain its regularity. Green v. State, 27 Ala. App. 209, 170 So. 72 (1936).

This section requires the court of criminal appeals (formerly court of appeals) to consider objections reserved to the court's rulings on the admission of testimony. Kitchens v. State, 27 Ala. App. 336, 172 So. 297 (1937).

Under this section the court is enjoined to search the record without presumption either for or against the prisoner or the prosecution. Foster v. State, 44 Ala. App. 139, 204 So. 2d 148 (1967).

It is the duty of the appellate court under this section to review the record and the testimony for errors. Elliott v. State, 283 Ala. 67, 214 So. 2d 420 (1968).

It is the appellate court's duty in a criminal case to consider all questions apparent on the record or reserved. Wallace v. State, 290 Ala. 201, 275 So. 2d 634 (1973).

Even where guilty plea entered. — Under this section, the court is required to search the record for error even on a plea of guilty. Martin v. State, 42 Ala. App. 447, 167 So. 2d 915 (1964). See also Mahaley v. State, 39 Ala. App. 472, 103 So. 2d 824 (1958).

"Reserved" in this section means that a point is raised by protecting the record in that the party appealing properly sought and obtained from the trial court an adverse ruling. Woods v. State, 54 Ala. App. 591, 310 So. 2d 891 (1975).

"Reserved" would seem to mean kept, held, retained or preserved. Woods v. State, 54 Ala. App. 591, 310 So. 2d 891 (1975).

Court is governed by record. — In a criminal prosecution, the consideration of the appeal by the court of criminal appeals (formerly court of

appeals) is governed by the record. James v. State, 28 Ala. App. 225, 181 So. 709 (1938). See A.R.A.P., Rule 10.

As submitted. — The court of criminal appeals (formerly court of appeals) is governed by the record as submitted, and where record is found to be regular in all respects with no discrepancies noted, it cannot be impeached by insistence to contrary made for first time in brief of counsel on appeal. Green v. State, 27 Ala. App. 209, 170 So. 72 (1936). See A.R.A.P., Rules 10 and 11 as to record on appeal and Rules 28, 29 and 30 as to briefs.

Thus the appellate court cannot use excluded evidence for review under this section. Ferrell v. State, 41 Ala. App. 659, 148 So. 2d 656 (1963).

No review of questions not properly raised. — This section does not mean that in a noncapital case a review will be made of questions which are not properly raised. Segers v. State, 283 Ala. 682, 220 So. 2d 848 (1969); Harnage v. State, 290 Ala. 142, 274 So. 2d 352 (1972).

Effect of omission of exhibits from record. — The omission of exhibits from a record precluded review as to the sufficiency of the evidence. Lindsay v. State, 41 Ala. App. 85, 125 So. 2d 716 (1960), cert. denied, 366 U.S. 933, 81 S. Ct. 1656, 6 L. Ed. 2d 392 (1961). See A.R.A.P., Rule 10.

Assignment of errors not required. — This section renders assignment or joinder of errors unnecessary in criminal cases. Slaughter v. State, 21 Ala. App. 211, 106 So. 891 (1926); Woodham v. State, 28 Ala. App. 62, 178 So. 464 (1938); James v. State, 28 Ala. App. 225, 181 So. 709 (1938). See now A.R.A.P., Rule 20.

In criminal appeals, this section expressly abolishes assignments of error. Ray v. City of Prichard, 45 Ala. App. 32, 222 So. 2d 345 (1969).

Under this section, whether errors are assigned or not, the duty devolves upon the appellate court to consider all questions apparent on the record or reserved. Slaughter v. State, 21 Ala. App. 211, 106 So. 891 (1926); Perkins v. State, 24 Ala. App. 138, 131 So. 461 (1930). See also Pate v. State, 27 Ala. App. 319, 173 So. 393 (1936).

But it is permissible to assign errors in a criminal case, and doing so does not preclude court, as required by this section, from considering all questions apparent on the record or reserved. Slaughter v. State, 21 Ala. App. 211, 106 So. 891 (1926). Layton v. State, 23 Ala. App. 297, 124 So. 406 (1929); Perkins v. State, 24 Ala. App. 138, 131 So. 461 (1930). See A.R.A.P., Rule 20.

Requirement as to filing of brief by defendant. — The filing of a brief is not essential to court's consideration of an appeal by a defendant in a criminal case. Higginbotham v. State, 262 Ala. 236, 78 So. 2d 637 (1955); Chappelle v. State, 267 Ala. 37, 99 So. 2d 431 (1957); Phillips v. State, 272 Ala. 216, 130 So. 2d 822 (1961); Adams v. State, 280 Ala. 678, 198 So. 2d 255 (1967); Blakely v. State, 43 Ala. App. 654, 198 So. 2d 803 (1967); Seals v. State, 282 Ala. 586, 213 So. 2d 645 (1968). But see A.R.A.P., Rule 31.

Under this section it is unnecessary to file a brief in a criminal case. Hymes v. State, 209 Ala. 91, 95 So. 383 (1923). See also Bertalsen v. State, 20 Ala. App. 539, 103 So. 480 (1925); Payne v. State, 261 Ala. 397, 74 So. 2d 630 (1954); Walker v. State, 265 Ala. 233, 90 So. 2d 221 (1956).

Although no brief has been filed on behalf of appellant, the court must consider all questions apparent on the record or reserved by former bill of exceptions. French v. State, 28 Ala. App. 147, 180 So. 592 (1938); Mullins v. State, 28 Ala. App. 288, 183 So. 894 (1938); Hovey v. State, 29 Ala. App. 149, 195 So. 282 (1940); Gibbs v. State, 33 Ala. App. 374, 34 So. 2d 28 (1948); Johnson v. State, 257 Ala. 644, 60 So. 2d 818 (1952).

Briefs in criminal appeals are not required. King v. State, 43 Ala. App. 319, 189 So. 2d 787 (1966).

Under this section a brief is not mandatory in a criminal appeal. Cowart v. State, 44 Ala. App. 201, 205 So. 2d 250 (1967).

Effect of failure of attorney general to file brief. — Even though the attorney general neglects to file a supplemental brief under this section, the court will not ignore its duty to conduct independent research. In such instance, this section has turned into another "lazy lawyer" enactment. Kenny v. State, 51 Ala. App. 35, 282 So. 2d 387, cert. denied, 291 Ala. 786, 282 So. 2d 392 (1973). See A.R.A.P., Rule 31.

Necessity of argument as to question by defendant. — Under this section, the court could consider whether overruling petition for removal to federal court was error, though appellant did not argue any question connected with such ruling. Norris v. State, 236 Ala. 281, 182 So. 69 (1938).

If question reserved on appeal from judgment of conviction is of substance which might have affected result, court must consider it, though not argued by appellant or his counsel. Wesson v. State, 238 Ala. 399, 191 So. 249 (1939); Sanders v. State, 278 Ala. 453, 179 So. 2d 35 (1965).

Effect of silence of attorney general's brief as to particular matter. — Though the silence of the attorney general's brief might be construed as confession of error, such a circumstance cannot under this section be a decisive factor in reversing. For, by the terms of this section in criminal appeals, the court must search the record and enter such judgment as the law remands. Strickland v. State, 40 Ala. App. 413, 115 So. 2d 273, cert. denied, 40 Ala. App. 234, 115 So. 2d 277 (1959).

Though the silence of the attorney general's brief might be construed as confessions of error, such a situation cannot under this section be a decisive factor in reversing. Gautney v. State, 284 Ala. 60, 222 So. 2d 175 (1969).

Striking a record so as to deny altogether a review in a criminal appeal is to follow a rule of strict construction contrary to the spirit of this section. Howton v. State, 43 Ala. App. 10, 178 So. 2d 566 (1965).

Under the spirit of this section the court will not honor requests to strike a pauper's record where a lower court has ordered a free transcript. Leonard v. State, 43 Ala. App. 454, 192 So. 2d 461 (1966). See A.R.A.P., Rule 24.

No motion for a new trial is essential or mandatory under this section. Gibbs v. State, 33 Ala. App. 374, 34 So. 2d 28 (1948).

The entry of a nolle pross is without any controlling influence on appeal. Owens v. State, 45 Ala. App. 227, 228 So. 2d 841 (1969).

Dismissal of appeal for escape pending appeal. — Dismissal of an appeal for escape of the appellant pending the appeal should be treated as a civil contempt rather than as an abandonment of the appeal. Hence the appeal would stand dismissed unless before the next call of the criminal list the appellant had purged himself of contempt by returning to the custody of the law. Hammonds v. State, 44 Ala. App. 256, 206 So. 2d 924 (1968).

This section implies an acceptance of the results of an appellate review, i.e., new trial or affirmance. However, it does not in any express term vest in the appellate court the power to declare the right of appeal forfeit. Hammonds v. State, 44 Ala. App. 256, 206 So. 2d 924 (1968).

While a record of a trial already had may compel an appellate finding that there should have been a judgment discharging the defendant, nevertheless, when a convicted defendant appeals claiming insufficiency of the evidence, he impliedly consents to another trial if the judgment below is held to be erroneous. Blackwell v. State, 42 Ala. App. 246, 160 So. 2d 493 (1964).

Under this section the court must enter such judgment as the law demands. Tool v. State, 21 Ala. App. 233, 107 So. 36 (1926); French v. State, 28 Ala. App. 147, 180 So. 592 (1938).

The general rule in reversing judgments of conviction where trial was had by jury is to remand case to trial court for further proceedings, but court of criminal appeals (formerly court of appeals) is bound to consider all questions apparent on record or reserved and must enter such judgment as the law demands. Robison v. State, 30 Ala. App. 12, 200 So. 626 (1940).

Discharge of defendant. — The court of criminal appeals (formerly court of appeals) has the power to discharge the defendant but only when the ends of justice so demand in the light of the entire record. Hendricks v. State, 252 Ala. 305, 41 So. 2d 423 (1949).

Discharging a defendant is not predicated on the withdrawal of the case from the jury, but is based on the power lodged in the supreme court and the court of criminal appeals (formerly court of appeals) under this section and § 12-22-241, to be exercised when the ends of justice so require. Hendricks v. State, 252 Ala. 305, 41 So. 2d 423 (1949).

The power of the court of criminal appeals (formerly court of appeals) to discharge is subject to the supervisory powers of the supreme court and should not be exercised merely from an insufficiency of the evidence to sustain the charge, unless the court of criminal appeals considers that further evidence to sustain the charge could not be adduced on another trial. Blackwell v. State, 42 Ala. App. 246, 160 So. 2d 493 (1964).

This requirement authorizes an absolute discharge where on appeal from conviction for burglary there is not even a scintilla of evidence to incriminate defendant as to commission of offense charged against him. Tool v. State, 21 Ala. App. 233, 107 So. 36 (1926).

Where no legal conviction of public drunkenness could be had on evidence, judgment of conviction was reversed and judgment entered discharging defendant from further custody. Atkins v. State, 27 Ala. App. 212, 169 So. 330 (1936).

Reversal. — A verdict not fixing the degree of murder as required by § 13-1-73, was fatally defective, and required reversal and remand under the instant section. Harden v. State, 211 Ala. 656, 101 So. 442 (1924). See also Roberson v. State, 175 Ala. 15, 57 So. 829 (1912); Howerton v. State, 191 Ala. 13, 67 So. 979 (1915).

A conviction in the circuit court for unlawfully possessing prohibited liquor was required to be reversed on appeal, where record before reviewing court failed to disclose on what process, if any, the defendant was tried or the judgment of conviction was based but where court had general jurisdiction and defendant was present in person before court and entered plea of not guilty, as against contention that appeal was required to be dismissed. James v. State, 28 Ala. App. 225, 181 So. 709 (1938). But see Smith v. State, 21 Ala. App. 70, 105 So. 397 (1925).

Where record submitted on appeal did not disclose that circuit court by any process ever acquired jurisdiction to try and determine case, judgment of circuit court could not prevail or be put in force and effect. James v. State, 28 Ala. App. 225, 181 So. 709 (1938).

Affirmance. — Where examination of record by court discloses no reversible error, under this